IN THE SUPREME COURT OF FLORIDA

CARL PUIATTI, :

Appellant, :

vs. : Case No. 65,321

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER

P. O. Box 9000 Drawer PD
Bartow, Florida 33830
(813)534-4200

COUNSEL FOR APPELLANT

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WHAT IS THE IMPACT OF CRUZ V. NEW YORK UPON THE CASE OF APPELLANT, CARL PUIATTI?

At page five of its brief Appellee claims that in his individual confession Appellant admitted his "willing" participation in Sharilyn Richie's murder, and that he "willingly" turned the car around to return to where Richie was standing and shot her. This is inaccurate. In his statement Appellant said he "really didn't want to" go back and shoot Richie. (R 2777) This statement shows reluctance, not "willingness."

At pages five through six of its brief Appellee expresses its disagreement with Appellant's conclusion that, in Florida, a Bruton[1/] violation can never constitute harmless error. The only support Appellee cites for its "disagreement" is the following:

> Indeed, in its prior decision on this appeal, this Court cited cases such as McCray v. State, 416 So.2d 804 (Fla.1982) and O'Callaghan v. State, 429 So.2d 691 (Fla.1983) to support the conclusion that appellant's guilt was clear and that no severance was required. 495 So.2d at 131.

(Brief of Appellee, p.6) The problem is that the Court's conclusion in this regard was based upon the fact that it found Appellant's and codefendant Glock's confessions to interlock, but, after Cruz v. New York, 481 U.S.__, 109 S.Ct.__, 95 L.Ed.2d 162 (1987), the fact that confessions interlock does not eliminate the need for severance.

1/ Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Furthermore, neither McCray nor O'Callaghan support the conclusion that a Bruton violation may constitute harmless error. These cases involved not Bruton violations, but rather the question of whether severance was required where codefendants presented antagonistic defenses. Indeed, as Appellant observed in his initial brief, the McCray Court noted that severance will always be required where a Bruton violation will occur if the codefendants are tried together. It is only

> [i]n situations less obviously prejudicial that the Bruton circumstance [that] the question of whether severance should [have been] granted must necessarily be answered on a case by case basis.

416 So.2d at 806.

Appellee seems to be saying at page seven of its brief that the joint statement given by Appellant and Glock imbued Glock's individual confession with "sufficient indicia of reliability to be admissible against appellant despite the lack of opportunity of cross-examination...." In this regard it should be remembered that the trial court never made a finding that Glock's individual confession possessed such "sufficient indicia of reliability" that it was admissible against Appellant; indeed, he at least implicitly found otherwise, because he instructed the jury that each individual's statement was admissible only against the man who gave it. (R 1914, 1920)

Contrary to the contention Appellee makes at page eight of its brief, Glock's individual confession did undercut Appellant's attempt at penalty phase to establish as a mitigating circumstance

that he was under the substantial domination of Glock. If Appellant were under Glock's domination, it is unlikely he would have suggested returning to kill Sharilyn Richie, as Glock's statement claimed, but would have depended upon Glock to direct his course of action.

Also on page eight of its brief, Appellee says, "Appellant's attempt to relitigate the question of whether a severance was required at penalty phase must fail" because "[t]his Court previously rejected the claim, and the Cruz decision does not preclude joint trials." Appellee fails to recognize that the question of severance of Appellant's penalty phase from that of codefendant Glock is inextricably bound up with the question of the propriety and harmfulness of admitting Glock's individual confession at the joint trial. Appellant is not trying to "relitigate" anything that is not a proper subject for this Court to consider, but the mandate of the Supreme Court of the United States requires this Court to re-examine Appellant's case in light of Cruz, and the harm Appellant suffered at penalty phase as a result of having Glock's statement admitted at their joint trial is certainly an important aspect of the case which this Court must address.

Appellee contends that Appellant did not argue on his direct appeal to this Court that "Glock's individual confession may have carried greater weight than the joint confession because the former was made by tape recording and the latter only read by a court reporter," and so, Appellee says, Appellant has waived this argument. (Brief of Appellee, p.9) Firstly, Appellee is incorrect when it says this argument was not raised previously. It may have

been raised during oral argument, and it certainly was expressed in paragraph 13. of Appellant's Motion for Rehearing. Furthermore, whether it was raised previously is irrelevant. This aspect of the case is not a new or separate ground Appellant is urging for reversal, but rather addresses the harmfulness of admitting Glock's individual confession at his joint trial with Appellant, which even Appellee concedes is the very issue which the briefs herein must address. Thus Appellee's assertion that Appellant's "brief on remand departs from this Court's order of June 8, 1987 setting a briefing schedule on reconsideration in light of Cruz" (Brief of Appellee, p.9) is totally devoid of merit. If Appellee honestly believes Appellant's brief does not comply with the Court's order, its proper remedy is a motion to strike the brief.

Several times in its brief Appellee repeats the argument that the joint statement of Appellant and Glock cured any problems with the admission of Glock's individual confession at their joint trial. (Brief of Appellee, pp.3,5,6,7,9-10) However, Appellee ignores a key fact that Appellant has attempted to stress previously, to-wit: that the jury which tried Appellant and Glock was not obligated to accept the version of events recounted in the joint statement. They were free totally to reject both the joint statement and Appellant's individual statement and to believe instead Glock's individual confession in which he blamed Appellant for formulating the idea to return and kill Sharilyn Richie, and blamed Appellant for firing the final and fatal shot. (Indeed, the court below specifically instructed the jurors that they could "believe or disbelieve all or any part of

the evidence or the testimony of any witness." (R 2166)) This point cannot be emphasized too strongly.

CONCLUSION

Appellant, Carl Puiatti, respectfully renews his prayer for the relief requested in his initial brief.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Robert F. Moeller
ROBERT F. MOELLER
Assistant Public Defender

P. O. Box 9000 Drawer PD
Bartow, FL 33830
(813)534-4200

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, 33602, by mail on this 6th day of August, 1987.

Robert F. Moeller
ROBERT F. MOELLER